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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 232

FRANK H. HILLS, ET AL.,
Petitioners

vs.

COLONEL EISENHART, ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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OCTOBER TERM, 1958

No. _____

FRANK H. HILLS, ET AL.,
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vs.

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioners, Frank H. Hills, Cecil La Mar, Arthur D. Dunkelburger, Calvin Winkler, Lloyd Barker, Alan Widener, Eual Blansett, Andrew O. Stanley, and Arthur Bowland, Appellants below, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on June 17, 1958. (R. 67-72)

OPINIONS BELOW

The Judge of the United States District Court for the Northern District of California did not render an opinion. The opinion of the United States Court of Appeals for the Ninth Circuit is set forth on pages 17-23 of the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 17 (A. 17). This application for a writ of certiorari is filed within ninety days from that date as provided may be done under the provisions of Title 28, Section 2101(e) of the United States Code.

QUESTIONS INVOLVED ON APPEAL

1. Whether permanent civil service employees of the United States, some of whom have veterans preference, employed at the Travis Air Force Base in California may be replaced in their positions and grades by military personnel.

2. Whether the United States District Court for the Northern District of California has jurisdiction to issue an injunction restraining the officers of the Travis Air Force Base from replacing civilian employees with permanent civil service status with military personnel.

3. Whether permanent civil service employees, some of whom have veterans preference, have a right of appeal to the United States Civil Service Commission where they are about to be unlawfully replaced with military personnel, and if so, does the administrative right of appeal, if such exists, have to be fully exhausted before resorting to the Courts to protect their rights as civil service employees of the United States.

STATUTES INVOLVED

"Sec. 652. *Removal from classified civil service only for cause.* No person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy there-

of, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; and copies of charges, notice of hearing, answer, reasons for removal, and of the order of removal shall be made a part of the records of the proper department or office, as shall also the reasons for reduction in rank or compensation."

5 U. S. C. 652.

Title 5, Sec. 861. Reduction in personnel; considerations affecting release.

In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: Provided, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: Provided furthur, That preference employees who efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: And provided further, That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions.

5 U.S.C. 863

"No permanent or indefinite preference eligible, who had completed a probationary or trial period

employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore preferred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, *specifically and in detail,* for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in suport of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: Provided, That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative office and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: Provided further, That the Civil Service Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 864 of this title. (June 27, 1944, c. 287, Sec. 14, 58 Stat. 390)

STATEMENT OF THE FACTS

The petitioners, plaintiffs below, are all employed as permanent civil service employees of the United States at the Travis Air Force Base in the State of California. The respondents are the officers in charge of the Travis Air Force Base. The complaint alleges that the respondents, defendants below, had threatened, and would unless enjoined, to discharge the petitioners from their positions and grades at the Travis Air Force Base in violation of Section 652, and Section 861 of Title 5 of the United States Code, and replace them with military personnel. The suit was brought in the United States District Court for the Northern District of California. (R. 41-46). The complaint alleged the controversy, and that the matter in controversy exceeded the sum of Three Thousand Dollars exclusive of interest and costs.

The complaint prayed for a temporary injunctional order, a preliminary injunction, and a permanent injunction, and also for a declaratory judgment declaring the respective rights of the parties, and for such other and further relief as to the Court might seem to be proper. (R. 46). A temporary injunction was issued.

No testimony was taken in the case for the reason that the respondents filed a motion to dismiss. After hearing argument of respective counsel for the parties, the District Court dismissed the complaint. (R. 62-63).

An appeal was then taken to the United States Court of Appeals for the Ninth Circuit. In the meantime, the injunctional order issued was continued in force pending the appeal to the Court of Appeals.

The appeal was heard by the Judges of the Court of Appeals on December 16, 1957. The Court of Appeals decided the case on June 17, 1958 (A. 17), one Judge dissenting, affirming the decision of the District Court. The injunctional order is still in force. The Court of Ap-

peals has stayed the issuance of the mandate to and including July 31, 1958 provided that a writ of certiorari is filed in this Court prior to that time.

SPECIFICATIONS OF ERRORS TO BE URGED

The petitioners will urge that the decision of the United States Court of Appeals for the Ninth Circuit, one Judge dissenting, conflicts with the decisions of this Honorable Court, and the decisions of United States Courts of Appeals in other Circuits.

The petitioners will urge that their rights as permanent civil service employees, some of whom had veterans preference, were to be wilfully and unlawfully violated by the respondents as alleged in the complaint. It will be further urged that the petitioners had no right of appeal to the United States Civil Service Commission in the situation in which they found themselves, and even if such a right of appeal existed, the actions contemplated by the respondents was of such an unlawful nature that injunctional relief should have been granted in any event. The petitioners contend that the United States District Court for the Northern District of California had full, complete and adequate jurisdiction over the parties, and the subject matter of the litigation and that the District Court clearly erred in dismissing the complaint, and the said Court of Appeals again erred in affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

The petitioners assert that a writ of certiorari should issue in this case to review the decision of the United States Court of Appeals for the Ninth Circuit pursuant to Rule 19, 1 (b) of the rules of this Court for the reasons that the Court of Appeals below had decided an important question of federal law in conflict with the decisions of this Court, and in conflict with the decisions of United

States Courts of Appeals of other Circuits on the question of exhausting administrative remedies before resorting to the Courts.

The decisions relied upon will be specifically called to the attention of the Court.

At the very outset petitioners want to state that it would be most difficult to state the position of the petitioners in this case, and the authorities relied upon with more clarity than the splendid dissenting opinion of the distinguished Jurist Pope who obviously searched well the authorities and whose opinion in this case appears to the petitioners to be unanswerable.

Petitioners well recognize the rule that in ordinary cases where there is an issue of fact and the right of appeal exists to an administrative board that such appeal rights must be first exhausted before bringing an action in the Courts.

The rule in those cases does not aply to this case. It has long since been the ruling of this Court, and the Courts of Appeals for the various Circuits, that where public officials are acting clearly contrary to law that their unlawful acts may be restrained without exhausting any appeal rights that may or might have existed.

One of the early cases in point on this question is the case of *Skinner & Eddy Corp. v. United States, 249 U.S. 557, 562* in which this Court held that the Interstate Commerce Commission could be restrained from placing into effect an order authorizing an increase in westbound transcontinental freight rates clearly in excess of their authority. This Court held that if the order had been a valid one the right of appeal would have to be exhausted, but where there was a total absence of authority to issue such an order, the Commission could be restrained without exhausting the right of appeal.

The United States Court of Appeals for the First Circuit followed the rule in the Skinner & Eddy Corp. case in the case of *Wyttre v. Hague, 168 Fed. 2d 500.* In that case, a suit by civil service employees and veteran preference eligibles in the Boston Naval Shipyard, the Court of Appeals held that their reductions in grade were unlawful, and that their rights would be protected without exhausting the rights of appeal to the United States Civil Service Commission.

There is a long line of authorities to support this exception to the general rule.

Colorado v. Toll, 268 U.S. 228, 69 L.Ed. 927.
Roberts v. United States, 176 U.S. 221, 229, 231, 44 L.Ed. 443.
Waite v. Macy, 246 U.S. 606, 62 L.Ed. 893.
Miguel v. McCarl, 291 U.S. 442, 78 L.Ed. 901.
Farley v. United States, 92 F.2d 533, 67 App. D.C. 382.
Dunlap v. Black, 128 U.S. 40, 48, 32 L.Ed. 354.
Wilbur v. United States, 281 U.S. 206, 218, 222, 74 L.Ed. 809.
United States v. Wilbur, 83 U.S. 414, 75 L.Ed. 1148.
Hammond v. Hull, 131 F.2d 23 (App. D.C.)
Noce v. Hill, 76 F.2d 198 (9th CCA)
Ferris v. Wilbur, 27 F.2d 262, 264 (4th CCA)
Work, Secretary v. Louisiana, 269 U.S. 250, 70 L.Ed. 259.
Dragna v. Landon, 209 F.2d, 26, 28, 9th CCA

The majority opinion of the Court of Appeals below conflicts with the decisions of this Court, and the other Courts of Appeals in the cases cited, and in fact conflicts with the decision of that Court in the case of Dragna v. Landon, supra.

There can be no question that the discharging of the petitioners from their rightful grades in governmental service was in direct violation of the Statutes of the United States which Congress had enacted to protect career employees of the United States such as these peti-

tioners. The statutes in this connection are cited on page 2-4 of this petition.

Where the civil service employee of the United States has obtained a permanent status, such as these petitioners had, they can only be removed from their positions in grade in accordance with the statutes providing for such removal.

The case of *Roth* v. *Brownell, 215 F.2d 500* is squarely in point as those of these petitioners who do not have veterans preference. Their rights are fully protected under Title 5, Section 652 of the United States Code quoted on pages 2-3 of this petition.

The remaining petitioners who have veterans preference may only be discharged from their positions and grades in accordance with Title 5, Section 861, and 863 of the United States Code quoted on pages 3-4 of this petition.

THE PETITIONERS HAD NO RIGHT OF APPEAL

The petitioners do not question the authority of the Respondents in a proper case to reduce the force of civilian employees in the Travis Air Force Base. If ordered by the Secretary of Defense, such a reduction in force may be accomplished. But the order to reduce the force in this case specifically provided that the civilian employees would not be affected by the order of reduction.

What was done in this case by the Respondents was not in effect a reduction in force. There was no actual reduction in force of the civilian employees contemplated. What was intended to do was to replace these Petitioners with military personnel. So, there was not in fact any reduction in force. The Petitioners therefore had no right of appeal under Section 861 Title 5 U.S.C. because the facts in the case do not fall within the provisions of this section of the U.S. Code.

For the history of the Acts of Congress relating to preference granted to Honorably discharged soldiers and sailors of the United States, the Court's attention is invited to the opinion of Mr. Justice Black in the case of *Hilton* v. *Sillivan, Sec. of the Navy, 334 U.S. 322, 92 L.Ed. 1416*, and also to the case of *Reynolds et al.* v. *Lovett et al., 201 F.2d. 181, D.C. Cir. Certiorari denied, 345 U.S. 926.*

In the concurring opinion of Mr. Justice Clark in the case of Reynolds et al. v. Lovett et al., supra, he stated that the conduct of the public officials in failing to accord the veterans their full rights was a greater menace to the country than the threat of the atom bomb.

This case falls well within the comment of Mr. Justice Clark in the Reynolds case.

The petitioners who were veterans had no right of appeal to the Civil Service Commission because there was not an actual reduction in force. The other petitioners whose rights were protected under Title 5, Section 652 also had no right of appeal to the Civil Service Commission.

Where such a situation exists, this Court has passed squarely on the question.

In the case of *Steele* v. *Louisville & Nashville Railroad Company, 323 U.S. 192, 89 L.Ed. 173* a railroad employee brought a suit to enforce certain rights. The statute gave him no right of appeal to any agency or department the right of enforcement of such rights. This Court held that the right of action was not precluded by the possibility of an administrative remedy. This case would appear to be in point.

The Petitioners had no right of appeal under Title 5, Section 863 U.S. Code pages 3-4 of this petition for the reason as stated by the dissenting Judge this section only applies to those cases where charges are filed against the governmental employees. In this connection the Court's

attention is invited to the case of *Ashley* v. *Ross, 191 F.2d 665, 89 U.S. App. D.C. 339* holding that the 30 days notice in Section 863 does not apply to reduction in force cases.

The Petitioners who were career employees without veterans preference definitely did not have any right of appeal to the United States Civil Service Commission.

The record discloses a communication from the Regional Office of the United States Civil Service Commission located at San Francisco, California which shows that there was no right of appeal to the Commission from the situation in which the Petitioners found themselves. (R. 13)

CONCLUSION

This case is of the utmost importance to permanent civil service employees now being employed in the various Air Force Bases, and other Military bases for the reason that if the right to replace such employees by military personnel is finally sustained by the Courts, it may well be expected that military personnel will replace all such permanent civil service employees and this may well include the civilian personnel employed in the Army, Navy, Air Force under the jurisdiction of the Secretary of Defense, and that the government will be eventually administered by men and women in uniform subject to Court martial proceedings. Congress by the establishment of the Civil Service laws intended that the work would be performed by employees qualified by the Civil Service Commission and not by the military authorities. Any unlawful attempt to substitute military personnel for permanent civil service employees should be halted at the earliest possible moment. The unlawful actions contemplated by the Respondents should be restrained by proper injunctional orders. The facts in this case disclose a case which is clearly within the rules of this Court authorizing the issuance of the writ of certiorari and that writ should be granted.

WHEREFORE, the Petitioners pray that a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit issue in this case, and that upon a review by this Court, that the judgment of the said Court of Appeals be in all things reversed and vacated, and that the case be returned for further proceedings in accordance with the views of this Court.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15,795

FRANK H. HILLS, ET AL., APPPELLANTS

vs.

COLONEL EISENHART, ET AL., APPELLANTS

Appeal from the United States District Court for the Northern District of California, Northern Division.

(PROCEEDINGS HAD IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

At a stated term, to wit: The October Term, 1957, of the United States Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Friday, the twenty-second day of November, in the year of our Lord one thousand nine hundred and fifty-seven.

Present:

Honorable ALBERT LEE STEPHENS, Chief Judge, Presiding,
Honorable CLIFTON MATHEWS, Circuit Judge,
Honorable WALTER L. POPE, *Circuit Judge*,

No. 15795

FRANK H. HILLS, ET AL., APPELLANTS

vs.

COLONEL EISENHART, ET AL., APPELLEES

ORDER ON APPLICATION FOR RESTRAINING ORDER, ETC.

ORDERED motion for temporary restraining order proceeded by Mr. Thomas W. Martin, counsel for Appellants in and by Mr. C. Elmer Collett; and Mrs. Joseph Bertain, Assistant United States Attorney, counsel for appellees in and submitted to the court for consideration and decision.

On consideration thereof, IT IS ORDERED that typewritten briefs on the merits be served and filed by the respective parties, prepared as required by Rule 18, as follows: brief of appellant within ten days; brief for appellees within ten days thereafter; the cause is assigned for hearing on the merits on December 16, 1957, 10:00 A.M., at San Francisco, California; cause to be heard on the original certified transcript.

Appellants are required to post a further supersedeas bond in the amout of $1,000.00 within five days from date.

IT IS FURTHER ORDERED that the temporary restraining order be continued in force and effect until December 16, 1957.

R. 64

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from proceedings of Monday, December 16, 1957.

Before: STEPHENS, Chief Judge, MATHEWS and POPE, Circuit Judges.

ORDER OF SUBMISSION

On motion of Mr. Thomas Martin, ORDERED, motion of Federal Employees Veterans Association to file brief Amicus Curiae, submitted to the court for consideration and decision.

On consideration whereof, IT IS ORDERED that leave be, and hereby is granted to file the aforementioned brief.

IT IS FURTHER ORDERED appeal herein argued by Mr. Thomas Martin, counsel for the appellants, and Mr. Claude L. Dawson, National Judge Advocate, Federal Employees Veterans Association, as Amicus Curiae, and by Mr. G. Joseph Bertain, Assistant United States Attorney, counsel for the appellees, and submitted to the court for consideration and decision.

R. 65

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Tuesday, June 17, 1958.

Before: STEPHENS, Chief Judge, MATHEWS and POPE, Circuit Judges.

ORDER DIRECTING FILING OF OPINIONS AND FILING AND RECORDINGS OF JUDGMENT.

ORDERED that the typewritten opinion, and dissenting opinion of Pope, Circuit Judge, this day rendered by this court in above cause be forthwith filed by the Clerk, and that a judgment be filed and recorded in the minutes of the court in accordance with the opinion rendered.

R. 66

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15,795

June 17, 1958

FRANK H. HILLS, CECIL LA MAR, ARTHUR D. DUNKELBURGER, CALVIN WINKLER, LLOYD BARKER, ALAN WIDENER, EUAL BLANSETT, ANDREW O. STANLEY, JAMES KING and ARTHUR BOWLAND, APPELLANTS

vs.

COLONEL EISENHART, COLONEL DALENE BAILEY, COLONEL DAVID DANIEL, COLONEL ROBERT DAVID, MAJOR JOHN DESMOND, MAJOR BRUCE L. SOOY, MAJOR LEO PURSEGLOVE, LIEUTENANT COLONEL BERNARD PASSERO and SAM BUTTURF, APPELLEES

Appeal from the United States District Court for the Northern District of California, Northern Division.

Before STEPHENS, Chief Judge, and MATHEWS and POPE, Circuit Judges.

MATHEWS, Circuit Judge.

On October 24, 1957, in United States District Court for the Northern District of California, Northern Division, appellants and two other plaintiffs brought a civil action against appellees, hereafter called defendants. The complaint alleged, in substance, that plaintiffs (appellants and their two coplaintiffs) were civilians employed in civil service positions at Travis Air Force Base; that defendants were United States Air Force officers at said base; that defendants had threatened to and would, unless enjoined, discharge plaintiffs from their positions in viola-

tion of 5 U.S.C.A. §§ 652 and 861; that there was an actual controversy between plaintiffs and defendants as to plaintiff's rights under 5 U.S.C.A. §§ 652 and 861; and that, as to each plaintiff, the matter in controversy exceeded the sum or value of $3,000 exclusive of interest and costs.

The complaint prayed for a temporary restraining order, a preliminary injunction and a permanent injunction restraining and enjoining defendants from discharging plaintiffs from their psitions; for a declaratory judgment declaring the respective rights of plaintiffs and defendants under 5 U.S.C.A. § 652 et seq.; and for such other and further relief as to the District Court might seem proper.

None of the defendants filed an answer. Instead, defendants, on November 12, 1957, filed a paper entitled "Motion to dismiss," consisting of a memorandum and a motion appended thereto. The memorandum was, in effect, a brief in support of the appended motion. The appended motion was, in effect, a motion to dismiss the action for lack of jurisdiction. On November 21, 1957, after a hearing at which no evidence was taken, the District Court filed an opinion[1] and entered a judgment which, in effect, granted the motion, dismissed the action for lack of jurisdiction and ordered plaintiffs to pay costs[2] in the sum of $880.21. This appeal is from the judgment.

The question presented is whether the District Court had jurisdiction of the action.

In determining this question, we must and do accept as true the allegations of fact in the complaint, no answer having been filed, no issue of fact having been raised or tried and no evidence having been taken. Accordingly, we accept as true the allegation that defendants had threat-

[1] Hills v. Eisenhart, D.C.N.D.Cal., 156 F. Supp. 902.

[2] See 28 U.S.C.A. § 1919.

ened to discharge plaintiffs from their positions in violation of 5 U.S.C.A. §§ 652 and 861. However, plaintiffs, if so discharged, could have appealed to the Civil Service Commission.[3] This was an adequate admistrative remedy.[4] As to whether any other administrative remedy was available to plantiffs, we express no opinion.

The complaint stated that plaintiffs had "no administrative appeal from the threatened action." What this statement meant is not clear. If it meant that plaintiffs had not appealed, it was an allegation of fact, and we accept it as true. If it meant that plaintiffs could not appeal to the Commission, if discharged in violation of 5 U.S.C.A. §§ 652 and 861, it was not an allegation of fact, but was a statement of a mere conclusion—a conclusion which we hold was incorrect.

The complaint alleged that on October 3, 1957, the Commission "advised[5] as follows: 'In reply to your recent letter,[6] you are advised that the agency's[7] determination to run a reduction in force in any particular kind of work is not appealable to the U.S. Civil Service Commission under the Retention preference regulations. An agency determination to effect a reduction in civilian personnel and to assign military personnel to carry on the duties formerly performed by civilian personnel is a problem outside our jurisdiction and is not the basis upon which

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[3] See 5 U.S.C.A. §§ 652 and 863.

[4] Johnson v. War Assets Administration, 7 Cir., 171 F. 2d 556; Johnson v. Nelson, D.C.Cir., 180 F. 2d 386; Green v. Baughman, D.C.Cir., 214 F. 2d 878; Young v. Higley, D.C.Cir., 220 F. 2d 487; Fitzpatrick v. Snyder, 1 Cir., 220 F. 2d 522; Burns v. McCrary, 2 Cir., 229 F. 2d 286.

[5] To whom this advice was given the complaint did not say.

[6] Whose letter this was the complaint did not say.

[7] What agency this was the complaint did not say.

we could accept a reduction in force appeal.'"[8] However, it is immaterial, if true, that the Commission gave this advice; for the giving of this advice could not and did not deprive plaintiffs of their right to appeal to the Commission, if discharged in violation of 5 U.S.C.A. §§ 652 and 861.

It did not appear from the complaint that plaintiffs had appealed to the Commission or had invoked any other administrative remedy. Much less did it appear that they had exhausted their administrative remedy or remedies. Instead, it appeared that they had not done so. Hence the District Court had no jurisdiction of the action.[9] This is true despite the fact—if it was a fact—that no administrative remedy was available to plaintiffs before they were discharged.[10] As to whether any such remedy was available to them before they were discharged, we express no opinion.

Judgment affirmed.

POPE, Circuit Judge.

I find myself unable to concur. The judgment below was based upon the claimed insufficiency of the allegations of the complaint, and this court sustains that action upon the stated ground that plaintiffs had not first exhausted an administrative remedy.

The statement of facts in the majority opinion is too brief to disclose the real grounds of the complaint. As I

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[8] In this advice, nothing was said about appeals by employees discharged in violation of 5 U.S.C.A. §§ 652 and 861.

[9] See cases cited in footnote 4. See also Porter v. Investors Syndicate, 286 U.S. 461; Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41; Macauley v. Waterman Shipbuilding Corp., 327 U.S. 540; Aircraft & Diesel Corp. v. Hirsch, 331 U.S. 752.

[10] See cases cited in footnotes 4 and 9.

read it, the complaint undertakes to negative any suggestion that this was a reduction in force,[1] or a removal, suspension or discharge for cause. It makes plain that appellants complain because they, long time civilian civil service employees, are about to be replaced in their positions by military personnel in direct violation of the direction of the Secretary of Defense that such should not be done.

As Civil Service employees they cannot be ousted without compliance with law. Roth v. Brownell, D.C. cir., 215 F. 2d 500. Their removal by an expedient particularly prohibited by the Secretary is not only unlawful, but void.

The case of Fitzpatrick v. Snyder, 1 cir., 220 F. 2d 522, 525, cited in the majority opinion, expressly recognized the continuing validity of the rule in Wettre v. Hague, 1 cir., 168 F. 2d 825, that where "plaintiffs are able to show a clear violation of some incontestible right under a federal statute" then there need be no exhaustion of administrative remedies. We recognized the rule of the Wettre case in Dragna v. Landon, 9 cir., 209 F.2d 26, 28, as another statement of the rule of Skinner & Eddy Corp. v. United States, 249 U.S. 557, 562.

Another reason why the failure to exhaust administrative remedies is not material here is that there were no such remedies for appellants to employ. Title 5, §§ 652 and 863 refer to discharges for cause; § 861 refers to reduction in personnel. Neither situation is presented here, and administrative remedies in those circumstances furnish no aid here. The regulations relating to Adminis-

---

[1] The complaint is not too clear, and perhaps should be ordered to be made more definite. It sets out (paragraph III) an order to "effectuate a 5% reduction of civilian payroll funding", with "reduction in civilian personnel levels . . . without replacement by military personnel," and alleges (par. V) that defendants, contrary to the stated restriction replaced appellants with military personnel. See the final paragraph of this opinion.

trative Personnel relate to those other kinds of situations.[2] One looks in vain for a regulation dealing with the remedy of an employee who is simply replaced with military personnel.

In fact, the complaint shows that appellants did indeed "exhaust" this non-existent administrative remedy, for they were advised by the Civil Service Commission: "In reply to your recent letter, you are advised that the agency's determination to run a reduction in force in any particular kind of work is not appealable to the U. S. Civil Service Commission under the Retention preference regulations. An agency determination to effect a reduction in civilian personnel and to assign military personnel to carry on the duties formerly performed by civilian personnel is a problem outside our jurisdiction and is not the basis upon which we could accept a reduction in force appeal." I cannot see what more could be expected.

The result of all this is, in my view, that these appellants have rights, established by law, which they are entitled to have determined in the court below, for they have presented a justiciable issue. As in Stark v. Wickard, 321 U.S. 288, the right to a judicial determination of appellants' rights "is found in the existence of courts."[3]

---

[2] Code of Federal Regulations, Title 5, Chap. I, "Civil Service Commission", particularly Parts 9 and 20.

[3] "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justicable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction." 321 U.S. pp. 309-310.

For a recent expression of this view of a court's jurisdiction, see Harmon v. Brucker, ... U.S. ....., (March 3 1958):

"Generally, judicial relief is available to one who has been injured

I would remand the case for its consideration on the merits. In a case as important as this (if this case stands real protection for civilian civil service in the Defense Department is gone) I think it particularly unwise to dispose of the case on the complaint alone for the same reasons stated in Kennedy v. Silas Mason Co., 334 U.S. 249, 256-7.

(Endorsed:) Opinion and Dissenting Opinion. Filed June 17, 1958.

Paul P. O'Brien, Clerk.

Court Opinion
R. 67 to 72 incl.

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by an act of a government official which is in excess of his express or implied powers. . . . The District Court had not only jurisdiction to determine its jurisdiction but also power to construe the statutes involved to determine whether the respondent did exceed his powers. If he did so, his actions would not constitute exercises of his administrative discretion, and, in such circumstances as those before us, judicial relief from this illegality would be available."

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15795

FRANK H. HILLS, ET AL.,
Appellants,

vs.

COLONEL EISENHART, ET AL.,
Appellees.

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Northern Division.

This cause came on to be heard on the Transcript of the record from the United States District Court for the Northern District of California, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment

Filed and entered: June 17, 1958

PAUL P. O'BRIEN, Clerk.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15795

FRANK H. HILLS, ET AL.,
Appellants,

vs.

COLONEL EISENHART, ET AL.,
Appellees.

CERTIFICATE OF CLERK, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 21 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, PAUL P. O'BRIEN, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing seventy-three (73) pages, numbered from and including 1, to and including 73, to be a full, true and correct copy of the entire record of the above entitled cause in the said Court of Appeals, made pursuant to request of counsel for the appellants, and certified under Rule 21 of the Revised Rules of the Supreme Court of the United States.

ATTEST my hand and the seal of the United States Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this eighteenth day of July, 1958.

/s/ Paul P. O'Brien
(SEAL) PAUL P. O'BRIEN

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FILED.
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No. 232

In the Supreme Court of the United States

OCTOBER TERM, 1958

FRANK H. HILLS, ET AL., PETITIONERS

v.

COLONEL EISENHART, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 51–61) is reported at 156 F. Supp. 902. The opinion of the court of appeals (Pet. 17–23) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1958 (Pet. 24). The petition for a writ of certiorari was filed on July 30, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether an elimination of civilian positions to reduce expenditures violates the civil service statutes.

2. Whether an alleged failure of military officers to comply with the instructions of their superiors in reassigning civilian employees to reduce payroll expenditures gives rise to a private cause of action in the employees affected.

3. Whether reassigned civilian employees whose former jobs are to be performed by military personnel in alleged violation of Defense Department economy instructions may sue to enjoin the action of the local administrative officers before protesting the action through the normal chain of command.

STATUTES INVOLVED

The pertinent provisions of Title 5 of the United States Code are printed in the Appendix, *infra*, pp. 9–11.

STATEMENT

Petitioners are civilian employees of the Department of the Air Force holding positions as "foremen" at Travis Air Force Base, California (R. 42). Respondents are command and administrative officers at the base (R. 45). In August 1957 the Secretary of Defense directed each military department to reduce its total civilian payroll by 5 percent (R. 42). The order included the following instruction (R. 43):

> In accordance with past procedures, reduction in civilian personnel levels will be achieved without replacement by military personnel or substitution by contract operation. It is recognized that, in exceptional cases, temporary adjustments in the assignment of military and civilian personnel may be required as a matter of operational necessity. Such expedients,

> however, will be replaced by permanent arrangements which comply with the foregoing instructions at the earliest practicable date.

Petitioners were thereafter notified that, effective October 27, 1957, their "foremen" positions were being eliminated and they were being reassigned as "assistant foremen" (R. 44). Petitioners protested the proposed action to the Regional Director of the Twelfth United States Civil Service Region, who replied as follows (R. 21):

> * * * [Y]ou are advised that the agency's determination to run a reduction in force in any particular kind of work is not appealable to the U. S. Civil Service Commission under the retention preference regulations. An agency determination to effect a reduction in civilian personnel and to assign military personnel to carry on the duties formerly performed by civilian personnel is a problem outside our jurisdiction and is not the basis upon which we could accept a reduction-in-force appeal.
>
> * * * if you feel that the regulations were not properly applied in your case, you may appeal to this office within seven (7) days from the date of receipt of this letter by informing us specifically and in detail of the exact nature of the violations of the retention preference regulations.
>
> Regarding the nature of the complaint in your recent letter, we can only suggest that this matter be presented to Headquarters, U. S. Air Force, Washington, D. C., through the Commanding Officer, Travis Air Force Base, California.

Without seeking further administrative action, petitioners instituted this action to enjoin respondents from "discharging" them and for declaratory relief. The complaint alleged that the petitioners were being replaced by military personnel in furtherance of an alleged plan to replace top civilian supervisory personnel with military personnel, in "direct violation of the instructions of the Secretary of Defense * * * and * * * of plaintiffs' rights under Title 5 U. S. C. A. Sections 652 et seq." (R. 43–44). More specifically, petitioners asserted that their threatened "discharge" was "in violation of their rights under" 5 U. S. C. 652 and 861 (R. 41).

On respondents' motion, the district court dismissed the complaint for lack of jurisdiction (R. 51–62). The court held that petitioners' claim of a federal right which had been violated was so frivolous and insubstantial that there was no basis for federal jurisdiction (R. 54–55), and that in any event the petitioners had failed to exhaust their administrative remedies (R. 61). The court of appeals, Judge Pope dissenting, affirmed on the ground of failure to exhaust administrative remedies (Pet. 17–23).[1]

ARGUMENT

1. As part of a "reduction in force" required by a 5% reduction in the funds available to the Air

[1] Neither court below found it necessary to reach the Government's further contentions, equally dispositive of the case, that, since the injunction sought would require the Government to pay for petitioners' services, the action was an unconsented suit against the United States; that there was an adequate remedy at law (a suit for back pay); and that the Secretary of Defense was an indispensable party.

Force for its civilian payroll, the positions occupied by petitioners were eliminated and they were reassigned to lower-grade jobs. Petitioners concede that their seniority and veterans' preference rights were fully protected in the reassignments. They claim, however, that their positions were wrongfully eliminated. The contention is patently frivolous and the district court properly dismissed the action for lack of substance to the claim.[2]

The civil service statutes cited by petitioners, 5 U. S. C. 652, 861, and 863, are irrelevant to their contention. Sections 652 and 863 provide procedural safeguards in dismissals or demotions for cause (misconduct, inefficiency, etc.) and Section 861 protects seniority rights in the order of lay-off upon a reduction in force. They have no application to determinations of the number or kind of positions to be made available for civilian personnel. Such matters were necessarily left to the discretion of the responsible officials in determining the needs of the agency.

By denying the existence of a remedy under the civil service statutes, the petitioners substantially admit their inapplicability to the facts of this case. Nor do they seriously contend that there is any statute inhibiting the military departments from replacing, in any given position, civilian personnel with military. Their real complaint is simply that, in implementing the reduction in force, the military officers

[2] Arguably the dismissal on this ground should have been on the merits—failure to state a claim—rather than for lack of jurisdiction, but only the Government could be prejudiced by that error.

of the base have not complied with the instructions of their superiors. The order directing the reduction in force stated the general policy that, as in the past, the "reduction in civilian personnel levels will be achieved without replacement by military personnel or substitution by contract operation" (R. 43). Petitioners claim that respondents are planning to use military personnel in the positions from which they are being demoted, that such action will violate the above instruction, and that the respondents should therefore be enjoined from demoting them.

Clearly such allegations do not support a private right of action in petitioners. In the first place, the purpose of the order was not to protect petitioners but to assure that savings in one pocket would not be offset by added expenditures from another, a matter of no concern to petitioners. More fundamentally, the order was simply an instruction to respondents from their military superiors, and it is only to those superiors that respondents are accountable for compliance with it. For if the superiors approve of the action taken, then *ipso facto* there is no violation of instructions of which petitioners can complain. That is, the action proposed is fully subject either to revision or ratification by the respondents' superiors, and by hypothesis petitioners could not object to any action taken by them. An injunction against the proposed action solely on the ground of the respondents' alleged failure to comply with their superiors' instructions would thus deprive the superiors of their admitted right to order such action themselves. In short, questions whether a superior's instructions have

been properly implemented and, if not, what corrective measures should be taken are the exclusive concern of the military command and afford no basis for judicial intervention.

2. It is also clear that, as held by the court of appeals and alternatively by the district court, petitioners have failed to exhaust their administrative remedies. See, *e. g., Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. The difficulty experienced by the courts below in defining those remedies is due only to the difficulty of determining what rights petitioners are asserting. For any rights asserted under the civil service statutes, 5 U. S. C. 652, 861, and 863, petitioners undeniably have a right of appeal to the Civil Service Commission. (See 5 C. F. R. § 20.9 (1957 Supp.). Their claim that they have no such remedy is no more than an admission that their rights under those sections have not been violated—which of course they have not been. If, on the other hand, as appears to be the case, their only complaint is that the base officers did not comply with the instructions of their superiors, their remedy is to protest the action through the appropriate chain of command and ultimately to the Secretary of the Air Force.[4]

[3] Air Force Manual 40-1, c. AF E2-2, § 2, set forth at R. 22-23, provides procedures for processing civilian employee grievances, with the final determination being made by the Secretary of the Air Force.

[4] Candor compels the admission, though outside the record, that petitioners, or some of them, did indeed protest to the Secretary of the Air Force, both directly and through their Congressman. It is understood that the investigation of the matter has been suspended pending the outcome of this case.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
ALAN S. ROSENTHAL,
B. JENKINS MIDDLETON,
Attorneys.

AUGUST 1958.

APPENDIX

The pertinent provisions of Title 5 of the United States Code are as follows:

§ 652 (a). No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for removal or suspension without pay, and the order of removal or suspension without pay shall be made a part of the records of the proper department or agency, as shall also the reasons for reduction in grade or compensation; and copies of the same shall be furnished, upon request, to the person affected and to the Civil Service Commission. This subsection shall apply to a person within the purview of section 863 of this title, only if he so elects. [37 Stat. 555, as amended.]

* * * * * *

§ 861. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which

shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided,* That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further,* That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: *And provided further,* That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions. [58 Stat. 390.]

* * * * *

§ 863. No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (ex-

cept where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided,* That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: *Provided further,* That the Civil Service Commission may declare any such preferenee eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 864 of this title. [58 Stat. 390, as amended.]

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No. 232

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

FRANK H. HILLS, ET AL.,
Petitioners,

v.

COLONEL EISENHART, ET AL.,
Respondents.

Application for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 232

FRANK H. HILLS, ET AL.,
Petitioners.

v.

COLONEL EISENHART, ET AL.,
Respondents.

PETITION FOR REHEARING ON THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioners, Frank H. Hills, et al, file this petition for a rehearing in the matter of the petition for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit. The petition for the writ of certiorari was denied on October 13, 1958, and this petition for rehearing is filed within twenty-five days thereafter in accordance with rule 58 of this Honorable Court.

REASONS FOR THE REHEARING

This petition for rehearing is filed because of the tremendous importance of this case to all of the thousands of civil service employees now employed by the Department

of Defense in the various bases throughout the United States. If the intention of the Respondents prevail, it will amount to a complete destruction of the civil service system as far as it relates to employment at the various bases under the control of the Department of Defense.

Counsel for the petitioners believe that they have not brought out sharply enough to the attention of this Court the real situation that arises by the facts in this case.

In plain language, the commissioned officials of the Air Forces are demoting long time permanent civil service employees, and replacing the positions held by Commissioned Officers. If this right can at once be established, then we may reasonably expect that non-commissioned and even privates of the Air Forces will replace civilian employees of the lower grades.

This is plainly what is contemplated, and any such situation is clearly contrary to the public policy of this country which Congress definitely established by the Civil Service System.

The Solicitor General instead of opposing the granting of the writ of certiorari in this case should have, in view of the historical background in establishing the civil service system, prayed that the writ be granted in order to stop at the fountain head the attempt of the officials to turn this country into a military organization.

In the case of Stark v Wickard, 321 U.S. 288, this Court stated that the right to judicial determination of the Appellants' rights is found in the existence of the Courts. In plain words, it is the duty of the Courts to protect the petitioners' rights as civil service employees of the United States.

Attention is also directed to your decision in the case of Harmon v Brucker, Secretary of the Department of the Army, —— U.S. ——, 2 L. Ed. 2d 503, decided by this

Court on March 3, 1958. That case involved the review of the petitioner's discharge from military service. Among other things, this Court in its opinion said:

> "Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers."

This Court cited the following cases in support of this view:

> American School of Magnetic Healing v McAnnulty, 187 US 94, 108, 47 L.Ed. 90, 96, 23 S Ct 33
> Philadelphia Co. v Stimson, 223 US 605, 621, 622, 56 L.Ed. 570, 577, 578, 32 S Ct 340
> Stark v Wickard, 321 U.S. 288, 310, 88 L.Ed. 733, 748, 64 S Ct 559

This Court further held that the District Court has not only jurisdiction to determine its jurisdiction but also power to construe the statutes involved to determine whether the respondent did exceed his powers.

The foregoing language quoted from this court's opinion in Harmon v Brucker, supra, would seem to have given the District Court in California in this case full, adequate and complete jurisdiction over the subject matter of the litigation and the parties to the action for the reason that it is clear that the petitioners had no right of appeal to the Civil Service Commission.

CONCLUSION

For the reasons herein stated the petitioners pray that the order of October 13, 1958 denying the petition for the writ of certiorari in this cause be set aside and that this court issue a writ of certiorari to the U. S. Court of Appeals for the 9th Circuit and upon a review the judgment of the said Court of Appeals be in all things reversed and this cause remanded to that court in accordance with the views of this Court.

Respectfully submitted,

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Attorney for the Petitioners.
1049 Shoreham Bldg.,
Washington 5, D. C.

Certificate of Counsel

I, Claude L. Dawson, attorney for the petitioners do hereby certify that this petition for rehearing in this cause is made in good faith and not for the purpose of delay.

I further certify that it is restricted to grounds which are intervening substantial grounds not previously stated in the original petition for certiorari.

Claude L. Dawson
Attorney for the Petitioners